Keongco Malaysia Sdn Bhd v Ng Seah Hai

HIGH COURT (PULAU PINANG) — CIVIL SUIT NO 22–294 OF 2004
CHEW SOO HO JC
18 MARCH 2011

Sale of Goods — Goods sold and delivered — Action for — Whether contract for sale of goods made with defendant or with traders to whom goods delivered — Whether defendant mere intermediary

The plaintiff claimed US$290,299.90 against the defendant for four consignments of garlic from China that the plaintiff had sold and delivered, allegedly on the defendant's instructions, to two traders in India ('the Indian traders'). The plaintiff claimed the defendant had orally contracted for the goods to be supplied and that the defendant had even made a part-payment on the total sale price leaving the amount claimed still owing. The defendant denied he had any oral contract with the plaintiff for the goods and that he had only acted as an 'agent' to introduce clients in India to the plaintiff for a commission. He said after he had introduced the Indian traders to the plaintiff, the latter dealt directly with them. He denied he had made any part-payment to the plaintiff and also denied knowledge of the amount owing to the plaintiff for the sale of the goods.

Held, dismissing the plaintiff's claim with costs:

(1) The plaintiff had failed to prove the existence of an oral contract between itself and the defendant pertaining to the four consignments. All documentary evidence showed the contract for the goods sold and delivered was between the plaintiff and the Indian traders without any reference to the defendant. The defendant was not privy to the contracts for the goods (see para 10).

(2) The defendant's version of the case was consistent with the fact he could probably have been an 'agent' to introduce clients in India to the plaintiff for the purchase of garlic on a commission basis (see para 12).

(3) All dealings between the plaintiff and the Indian traders were direct between one and the other with no reference to the defendant at all. No documents involving the transactions and the demands for payment for the goods consigned were extended to the defendant for his information and payment (see para 12).

(4) There was clear evidence the part-payment was made by one of the Indian traders, Gupta Exports, and not by the defendant personally (see para 13).

[Bahasa Malaysia summary

Plaintif memohon US$290,299.90 terhadap defendan bagi empat penghantaran bawang putih dari negara China yang plaintif telah jual dan hantar, dikatakan atas arahan defendan, ke dua peniaga di India ('peniaga India). Plaintif menyatakan bahawa defendan telah secara lisan memasuki kontrak untuk barangan tersebut dibekalkan dan bahawa defendan juga telah membuat sebahagian bayaran atas jumlah keseluruhan harga jualan meninggalkan jumlah yang dituntut masih terhutang. Defendan menafikan bahawa dia mempunyai apa-apa kontrak lisan dengan plaintif untuk barangan tersebut dan bahawa dia hanya telah bertindak sebagai 'agent' untuk memperkenalkan pelanggan di India kepada plaintif untuk komisen. Dia menyatakan bahawa selepas memperkenalkan peniaga India kepada plaintif, plaintif berurusan secara langsung dengan mereka. Dia menafikan membuat apa-apa bayaran sebahagian kepada plaintif dan juga menafikan pengetahuan mengenai jumlah yang terhutang kepada plaintif untuk jualan barangan tersebut.

Diputuskan, menolak tuntutan plaintif dengan kos:

(1) Plaintif telah gagal membuktikan kewujudan kontrak lisan di antaranya dengan defendan berkaitan dengan empat penyerahan tersebut. Kesemua keterangan dokumentar menunjukkan kontrak jualan dan penghantaran barangan adalah di antara plaintif dengan peniaga India tanpa apa-apa rujukan kepada defendan. Defendan bukan pihak kepada kontrak-kontrak barangan tersebut (lihat perenggan 10).

(2) Versi defendan tentang kes adalah konsisten dengan fakta bahawa dia kemungkinan menjadi 'agent' untuk memperkenalkan pelanggan India kepada plaintif untuk pembelian bawang putih atas dasar komisen (lihat perenggan 12).

(3) Kesemua urusan di antara plaintif dan peniaga India adalah secara langsung sesama sendiri tanpa apa-apa rujukan langsung kepada defendan. Tidak ada dokumen-dokumen yang melibatkan transaksi dan tuntutan untuk bayaran untuk barangan yang dihantar diberikan kepada defendan untuk pengetahuannya dan bayaran olehnya (lihat perenggan 12).

(4) Terdapat keterangan yang jelas bayaran sebahagian dibuat oleh salah seorang peniaga India, Gupta Exports, dan bukan oleh defendan secara peribadi (lihat perenggan 13).]

Notes

For cases on action for goods sold and delivered, see 11 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 771–775.

Cases referred to

Chong Swee Huat & Anor v Urn Shian Ghee T/A L & G Consultants & Education Services [2009] 3 MLJ 665; [2009] 4 CLJ 113, CA (refd)

EON Bank Bhd v Hotel Flamingo and another case [2005] 1 MLJ 712, HC (refd)

International Times & Ors v Leong Ho Yuen [1980] 2 MLJ 86, FC (refd)

Tan Swee Hoe Co Ltd v Ali Hussain Bros [1980] 1 MLJ 89; [1979] 1 LNS 113 (refd)

UN Pandey v Hotel Marco Polo Re Ltd [1980] 1 MLJ 4 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 23
Evidence Act 1950 ss 11, 101, 102, 103

Ben Lee Kam Foo (Ken Yong & Ben Lee) for the plaintiff.
N Saraswathy (V Alagendra with her) (N Saraswathy Devi) for the defendant.

Chew Soo Ho JC:

BRIEF FACTS

[1] The plaintiff's claim against the defendant is for the sum of USD290,299.90 being goods allegedly sold by the plaintiff to the defendant and delivered upon instruction by the defendant to two Indian traders namely Gupta Exports and Shubh Ovearseas in India. The plaintiff alleged that the defendant in his personal capacity contracted with the plaintiff orally for the purchase of the goods which were in four consignments of garlic from China for which the plaintiff had accordingly delivered to the abovenamed two Indian traders as follows:

	Date	Shipment	Invoice No.	Price (USD)
1.	28.12.1999	Goods sent from Port Klang to Chennai, India on board the ship 'Tiger Bridge' to Gupta Export.	00035658	73,158.00
2.	31.1.2000	Goods sent from Port Klang to Chennai, India on board the ship 'Jam Bhum' to Gupta Export.	0003711	73,247.00
3.	31.1.2000	Goods sent from Port Klang to Chennai, India on board the ship 'Jam Bhum' to Shubh Overseas.	00037114	27,952.00

4.	31.1.2000	Goods sent from Port Klang to Chennai, India on board the ship 'Tiger Bridge' to Shubh Overseas.	00037115	171,427.90
	Total	345,784.90		

[2] The plaintiff further alleged that defendant had made part payment in the sum of USD55,458 towards the total sum of USD345,784.90 leaving the sum of USD290,299.90 still due and payable to the plaintiff which the defendant failed, refused and/or neglected to pay upon repeated demand.

[3] The defendant denied that he had entered into any oral contract with the plaintiff in respect of the above four consignments but that he acted as an agent to introduce clients in India to the plaintiff for a commission. The defendant alleged that after his introduction of the two Indian traders to the plaintiff, the plaintiff had dealt with the Indian traders directly thereafter in respect the said four consignments. There was, as contended, no privity of contract between the plaintiff and the defendant on these four consignments. The defendant claimed that he had no knowledge of the sum due and owing from the invoices and denied that he had made any part payment of USD55,485 to the plaintiff. In addition, the defendant alleged that he was abducted when he was in Ambassador Hotel, Shenzhen, China on 1 April 2004 and taken to a restaurant where he was held for about 5–10 minutes. Subsequently he was taken to another restaurant and detained in a room for about 45 minutes where he was forced to sign three blank paper. The defendant was ultimately released after his signature was allegedly verified. A report was lodged with the police at Shenzhen. The defendant believed that his abduction had the connection with the plaintiff's claim as the plaintiff has an office in Shenzhen, China. After this incident, the plaintiff through its solicitors issued notices dated 6 April 2004 and 27 April 2004 to the defendant claiming the sum of USD290,299.90. The defendant contended however that he had not received these notices sent to Penang/Butterworth address as he was residing in India at the material time. The defendant contended that he had not owed the plaintiff the sum of USD290,299.90 as claimed.

THE ISSUES

[4] Several issues have been raised for trial in bundle F but suffice to say, only the following two issued deduced therefrom are to be determined by this court in this case which would have incorporated all relevant issues:

(a) Whether the plaintiff has proved that the defendant had entered into an oral and legally binding contract with the plaintiff in respect of the abovementioned four consignments delivered to Gupta Exports and

Shubh Overseas in India or whether the defendant is privy to the contract pertaining to the said consignments dated 28 December 1999 vide Invoice No 00035658, 31 January 2000 vide Invoice No 00037111, 31 January 2000 vide Invoice No 0037114 and 31 Janauary 2000 vide Invoice No 00037115 respectively; and

(b) Whether the defendant had agreed to be personally liable for the payment of the said four consignments and had consequently made part payment in the sum of USD55,485 to the plaintiff in respect of the consignments.

EVALUATION AND FINDINGS

The first issue

[5] It is a fact in this case that there is no written contract between the plaintiff and the defendant in respect of the aforesaid four consignments of garlic vide the aforesaid invoices which goods the plaintiff had shipped to Gupta Exports and Shubh Overseas in India respectively on 28 December 1999 and 31 January 2000. There is no dispute that these goods were shipped and delivered to Gupta Exports and Shubh Overseas by the plaintiff. The plaintiff's evidence through its director and sole witness, SP1, stated that the plaintiff and the defendant had been engaged in business for about 19 years since 1991 in that the defendant had been the plaintiff's client for the import and export of food stuff such as rice and garlic in his personal capacity although the defendant had at times used a firm named Janatas Onion Packing Centre to make the purchase and to give instruction to the plaintiff to send the goods to third parties. Basically, the plaintiff averred that the contracts between the plaintiff and the defendant were all along oral and based on trust. In respect of the aforesaid four consignments, SP1 said that sometimes in December 1999 and January 2000, the defendant had agreed to purchase and had placed order for the said four consignments of garlic orally together with the instructions as to the delivery of these consignments. These agreements and instructions were made and given by the defendant to SP1 as director of the plaintiff at the material time. The defendant, on the other hand, denied that he was the true purchaser and that he was responsible for the four consignments. His role all along with the plaintiff was to introduce buyers particularly of garlic to the plaintiff as he personally did not deal with garlic but rice and onions and the plaintiff would pay him commissions upon the sales concluded. Throughout the dealings, the defendant stated he had never undertaken to pay on behalf of the clients to whom the goods were delivered to. In respect of the said four consignments of garlic, it was on the request made by Mr Lee Beng Huat who was managing the plaintiff's business at the material time to introduce potential buyers for garlic in India that the defendant introduced Gupta Exports and Shubh Overseas to the plaintiff. Thereafter, they dealt directly

with each other for which the defendant was no longer involved. In brief, the the plaintiff is alleging that there is an oral contract between the plaintiff and the defendant in relation to these four consignments whereas the defendant alleged that he was not privy to the contracts between the plaintiff and the consignees ie Gupta Exports and Shubh Overseas respectively as he merely introduced these two Indian traders to the plaintiff for commissions and that contracts were directly between the plaintiff and the Indian traders.

[6] In submission, both parties have submitted on the burden of proof with the plaintiff citing the case of *Chong Swee Huat & Anor v Urn Shian Ghee T/A L & G Consultants & Education Services* [2009] 3 MLJ 665; [2009] 4 CLJ 113 and the defendant citing *EON Bank Bhd v Hotel Flamingo and another case* [2005] 1 MLJ 712 and *UN Pandey v Hotel Marco Polo Re Ltd* [1980] 1 MLJ 4. The law is trite that he who asserts the existence of facts must prove that those facts exist: s 101 of the Evidence Act 1950. In civil proceedings, the burden of proof rests solely on the plaintiff to prove his case on a standard of balance of probabilities throughout the trial whereas the onus of proof or evidential burden is not stable and constantly shifts during the trial from one side to the other according to the scale of evidence and other preponderates. Such shifting is one continuous process in the evaluation of evidence. According to ss 102 and 103 of the Evidence Act 1950, if the party with whom the onus lies, whether initially or subsequently, as a result of its shifting does not give any or further evidence or gives evidence which is not sufficient, such party must fail: per His Lordship Salleh Abas FCJ (as he then was) in *International Times & Ors v Leong Ho Yuen* [1980] 2 MLJ 86 (FC); see *EON Bank Bhd* where His Lordship Low Hop Bing J (now JCA) followed the distinction of burden and onus of proof as aptly drawn in *International Times & Ors*. Having said the distinction between burden of proof and onus of proof, the question to ask is whether the plaintiff who bears the burden has proved the existence of an oral contract between the plaintiff and the defendant in the sense whether the defendant had offered to purchase and the plaintiff had accepted and agreed to sell and whether the defendant had agreed and undertaken to pay for the four consignments upon their delivery to the abovenamed two Indian traders. In situation such as this when both parties had given diametrically conflicting versions and in the absence of any other viva voce evidence from other witnesses, this court will have to look at the other documentary evidence and/or the conduct of the parties to determine the probability and improbability of the case. In the present world, the conventional mode of doing business based on trust and oral contract may appear outdated. Nevertheless, the law still recognises an oral contract provided that the party concerned will be able to prove the existence of such a contract and its validity. As allegation of the existence of oral contract is so vulnerable of being concocted in the sense that it could be easily alleged to suit one's claim, the court must scrutinise evidence adduced with magnifying eyes to evaluate such evidence stringently. All necessary ingredients in law of a contract must be

strictly proved by the plaintiff to satisfy fundamentally the existence of a contract. Any flimsy evidence must be rejected. Strict proof must be adhered to.

[7] On the first consignment vide the plaintiff's invoice No 00035658 dated 28 December 1999 (bundle B p 12), Gupta Exports vide its letter dated 17 December 1999 (bundle B p 11) had written to the plaintiff and requested the plaintiff for the shipment of garlic in the number of metric tons according to the schedule provided therein. SP1 agreed in cross-examination that the invoice at bundle B p 12 was issued after receiving Gupta Exports' letter bundle B p 11. He further admitted that the bill of lading with the consignment shipped on board the vessel Tiger Bridge on 26 December 1999 was also in relation to Gupta Exports' letter, bundle B p 11. The invoice No 00035658 (bundle B p 12) and the delivery order (bundle B p 13) were issued in the name of Gupta Exports while the bill of lading (bundle B p 14) was in the name of 'To The order of the Global Trust Bank Limited' as the consignee which was Gupta Exports' bankers as provided in its letter bundle B p 11 and Gupta Exports was the 'First Notify Party' in the stipulated column in the bill of lading. It was also admitted by SP1 that the name of the defendant did not appear in any of these documents, bundle B pp 11–14. The defendant had also not signed on the said invoice and delivery order as the receiver of the goods in the provided column which was in fact blank. From this evidence, it is amply clear that the offer to purchase the goods did not come from the defendant but directly from Gupta Exports vide its letter bundle B p 11, to the plaintiff which the plaintiff accepted. Thus, the plaintiff has failed to prove this offer and acceptance are with the defendant. The date for the conclusion of a valid contract especially an oral one is pertinent and it must be specific to achieve certainty. Party cannot assume any date by saying sometime in December 1999 and January 2000 as in this case vide the evidence of SP1 in P1 (witness statement). The plaintiff in this respect has not proved as to when an oral contract had been concluded between the plaintiff and the defendant. The statement of account for the period ending 14 January 2000 (bundle B p 22) pertaining to the same invoice No 00035658 for the sum of USD73,158 which is the same invoice sum as in bundle B p 12 was not addressed to the defendant but to Gupta Exports with no copy to the defendant. Although the plaintiff had enclosed a letter from the defendant dated 15 January 200_ (the year is not completely legible from this letter) addressed to Mr Lee Beng Huat (bundle B p 23) in respect of a shipment of garlic to Gupta Exports which states that Gupta Exports had refused to accept the 15 containers of garlic cosigned to them and the defendant had taken delivery with full amount paid to the bank, no evidence had been led by the plaintiff to show the relevance of this letter whether it bears any relation to the consignment vide invoice No 00035658. Parties cannot just bundle all documents and throw them to court without leading evidence with reference to the documents to show their relevance and importance. Letter in bundle B p 23 bears no reference to invoice No

00035658 and whether it is relevant to this consignment or otherwise, this court is not appraised with any evidence. I therefore find it appropriate to rule that this letter of the defendant is not relevant to this consignment vide invoice No 00035658 and will therefore accord no weight to its contents. From the documents in bundle B pp 11–14 and p 22, none of them has indicated that the order for this consignment was placed by the defendant nor that any one of them had indicated the involvement of the defendant in this transaction since none of these documents were even copied to the defendant. Since Gupta Exports vide its letter bundle B p 11 offered to buy and the plaintiff vide its invoice and delivery order, bundle B pp 12 and 13, had accepted the offer and executed its performance by delivering the goods, the contract is concluded between the plaintiff and Gupta Exports. If the defendant had agreed and undertaken to pay for this consignment, it is only logical that the statement of account claiming the sum for this consignment would have been directed to defendant for payment. Even assuming that for accounting purpose as attempted to explain by SP1 that the account was in the name of Gupta Exports and all documents relating thereto ought to be in the name of Gupta Exports, I find it difficult to comprehend why the statement of account requesting for payment in particular was not even copied to the defendant with a note that this sum was due and still owing and that the defendant should expedite payment if indeed the defendant was the contracting party who undertook to pay for that consignment. Any prudent businessman will know who the party under the contract was obligated to pay the price for the goods consigned irrespective whether the goods were received by a third party as instructed by the contracting party, and will naturally chase for payment from the contracting party. I find it improbable that the plaintiff had left the defendant out totally without informing the defendant that the goods had been delivered safely to Gupta Exports as instructed and that the sum of payment was due for the defendant to pay accordingly but instead, the plaintiff had asked for payment directly from Gupta Exports. Such an act or conduct of the plaintiff may only suggest that there might not be a contract between the plaintiff and the defendant but that a direct contract was between the plaintiff and Gupta Exports consistent with the documentary evidence adduced. In respect of the second consignment to Gupta Exports of India vide invoice No 00037111 dated 31 January 2000 (bundle B p 26), delivery order (bundle B p 27, the packing list (bundle B p 36) and bill of lading (bundle B pp 28–29) all of which were dated the same date showing shipment from Port Klang to Chennai with Gupta Exports' banker, the Global Trust Bank Ltd as consignee, again no reference was made of the defendant nor was the defendant asked to sign as the receiver of the goods in the said invoice and delivery order; the relevant column for such signature and chop was indeed left blank. No copy of such documents were extended to the defendant since there is no correspondence to that effect. The position of this second consignment to Gupta Exports is akin to the first consignment. From the facts, I do not find a contract to have existed between the plaintiff and the defendant but a valid

contract between the plaintiff and Gupta Exports. For the third consignment vide invoice No 00037114 dated 31 January 2000 (bundle B p 30), delivery order of same date (bundle B p 31) and bill of lading of even date (bundle B pp 32–33), the invoice and delivery order were addressed to Shubh Overseas of India and Shubh Overseas' banker ie the Bank of Rajastan Ltd which SP1 admitted to have been supplied by Shubh Overseas was the consignee stated in the bill of lading with Shubh Overseas as the 'First Notify Party'. Similarly, no reference was made of the defendant in these documents nor was there any correspondence from the plaintiff to show that these documents were extended to the defendant. There is no evidence of any involvement by the defendant.

[8] The fourth consignment involves the plaintiff's invoice No 00037115 dated 31 January 2000 (bundle B p 34), delivering order dated the same date (bundle B p 35). Both documents were issued to Shubh Overseas. The bill of lading of even date (bundle C p 7 of exh D2) was issued with Shubh Overseas as the 'First Notify Party' and the order of the Bank of Rajastan Ltd which was Shubh Overseas' banker as consignee. Exhibit D2 which comprises of 13 pages of documents in bundle C, of the plaintiff's packing lists dated 28 January 2000 and 31 January 2000, phytosanitary certificate for re-export from Department of Agriculture Malaysia dated 29 February 2000 and 31 January 2000, certificates of origin dated 31 January 2000 issued by Malaysian International Chamber of Commerce & Industry, the plaintiff's invoices dated 28 January 2000 and 31 January 2000 and phytosanitary certificate from the Ministry of Agriculture of PR China issued on 3 Nolvember 1999, were admitted by SP1 to be the shipping documents regarding the two consignments vide invoice Nos 00037114 and 00037115 above and they all related to Shubh Overseas of India. In other words, all the documents relating to these two shipments to Shubh Overseas did not bear any reference to the defendant. There is, further, no evidence to show that any of these relevant documents were extended or copied to the defendant for his notification and more importantly for ultimate payment. Similarly, documentary evidence and the facts do not suggest the existence of a valid contract between the plaintiff and the defendant but between the plaintiff and Shubh Overseas in respect of the third and fourth consignments.

[9] Subsequent to the shipment of the aforesaid four consignments, requests for payment were made by the plaintiff directly to Gupta Exports vide bundle B p 37 — documentary collection, B p 44 — statement of account dated 31 March 2000 and B p 45 — statement of account dated 29 December 2005, and to Shubh Overseas vide statement of account dated 31 March 2000 and 29 December 2005 respectively (bundle B pp 43 and 46). From these documents requesting for payments, it is to be noted that they were not copied to the defendant and there is no evidence to show that the plaintiff had extended copies of these requests for payment to the defendant nor any evidence that the

plaintiff had ever written to the defendant to request for the payments of the four consignments duly shipped to India upon the defendant's alleged instruction. SP1 explained that the plaintiff did not write to the defendant because that was their practice and because the companies might belong to the defendant. I find from this explanation by SP1 that the companies might belong to the defendant so that they wrote directly to the companies concerned instead of the defendant showed unequivocally that the plaintiff was dealing directly with the companies and not with the defendant individually. If the contract was between the plaintiff and the defendant individually for which the defendant was alleged to have obligated to pay for the consignments, it is only prudent and probable that all requests for payment would have been directed to the defendant individually irrespective whether the goods consigned might have been delivered and received by Gupta Exports and Shubh Overseas if that was the instruction of the defendant. The conduct of the plaintiff in requesting for payment directly from the two Indian traders instead of from the defendant only goes to show that the contract was between them and not the defendant individually or independently. On the plaintiff's allegation of a practice, I must say that there is no evidence led by the plaintiff to show such practice that goods were ordered by defendant with instructions to deliver to third party or parties while payments were made by the defendant. Section 11 of the Evidence Act 1950 provides, inter alia, that facts not otherwise relevant are relevant if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable. The plaintiff had failed to prove the other facts which constitute the practice as alleged although it attempted to show that the defendant had used a firm or a company by the name of Janatas Onion Packing Center for some of the defendant's past dealings. However, no evidence was led to show that Janatas Onion Packing Center was involved in this case. It is undoubted that an oral promise given at the time of contracting which induces a party to enter into the contract overrides any inconsistent written agreement and constitutes a separate contract which exists side by side with the main agreement: per His Lordship Raja Azlan Shah CJ (Malaya) (as His Royal Highness then was) in *Tan Swee Hoe Co Ltd v Ali Hussain Bros* [1980] 1 MLJ 89; [1979] 1 LNS 113 (FC) as submitted by the the plaintiff. However, the plaintiff's case is not premised on collateral contract with the defendant but a direct oral contract. The fact that the plaintiff had not kept the defendant informed of the progress of the goods sold and delivered nor did the plaintiff request for payment from the defendant is inconsistent of a collateral contract.

[10] From all relevant documents referred to above and the conduct of the plaintiff herein this case, upon finding of fact and on a balance of probabilities, I find that the plaintiff had failed to prove the existence of an oral contract between the plaintiff and the defendant pertaining to the four consignments abovementioned. Since all documentary evidence show and prove that the contract for the goods sold and delivered was between the plaintiff and Gupta

Exports and Shubh Overseas respectively without any reference to the defendant, I hold on a finding of facts that the defendant was not privy to the said contract pertaining to the aforesaid four consignments.

[11] The defendant (SD1) in his sole evidence testified that he resides in Chennai India and not in Penang. He did not enter into any contract with the plaintiff for the purchase of the four consignments of garlic from China but merely introduced clients to the plaintiff for commission of USD10 per container carton. He had introduced Gupta Exports and Shubh Overseas from India to the plaintiff and thereafter he was not involved in the business transaction between the plaintiff and the two Indian traders. He denied making purchase of the four consignments and giving instruction to the plaintiff to deliver them to the two Indian traders. He asserted that no documents such as invoices, shipping documents, statements and letters demanding payments for the outstanding sum of USD290,299.90 were sent to or received by him. He averred that the plaintiff was dealing with the two Indian traders directly and all documents relating to the contract were also issued by the plaintiff directly to the Indian traders who are not bogus but are still in existence. Referring to the plaintiff's two letters dated 29 December 2005 (bundle B pp 45–46). The defendant contended that even after he was sued in this case, the plaintiff vide these two letters still wrote to demand payment of USD90,920 from Gupta Exports and USD199,379.90 from Shubh Overseas in India without copying the said letters to the defendant. On the plaintiff's payment of commission to him at USD10 per metric ton, the defendant referred to bundle B pp 120–121 showing such payment by the plaintiff to him and another summary of commission at bundle B p 134.

[12] From the defendant's version of the case, I find his version to be consistent with the fact that he could probably be an 'agent' (using his own word) to introduce clients in India to the plaintiff for the purchase of garlic on a commission basis. Bundle B pp 120–121 which is a document from the plaintiff with the title 'Export of Fresh White Garlic to India — September to December 1999' detailing out payment of commission to the defendant calculated at USD10 per metric ton, for which no objection was taken by the plaintiff, substantiated the defendant's averment that his role was merely as 'agent' or more appropriately as intermediary to introduce clients to the plaintiff for payment of commission by the plaintiff. The defendant's version of being an intermediary for commission is indeed consistent with the fact that all dealings between the plaintiff and the two Indian traders were direct between one and the other with no reference to the defendant at all and no documents involving the four transactions and the shipments together with the demands for payment for the goods consigned were extended to the defendant for his information and payments. On a finding of facts and on a balance of probabilities, I find the defendant's version to be probable that he merely acted

as an intermediary for commission by introducing Gupta Exports and Shubh Overseas to the plaintiff and he did not enter into any personal contract with the plaintiff for the purchase of the four consignments of garlic.

The second Issue

[13] The plaintiff contended that out of the purchase price of USD345,784.90 for the four consignments, the defendant had paid the sum of USD55,458 leaving the balance of USD290.299.90 which the plaintiff is claiming. In his witness statement, exhs D3, Q & A 11, the defendant stated that he did not make that part payments but it was Gupta Exports which made the said part payment referring to Bank Bumiputra Malaysia Bhd's Advice on credit dated 17 January 2000 (bundle B p 24) and the plaintiff's receipt dated 20 January 2000 (bundle B p 25). Looking at the Account No 007 USD 0001 of the plaintiff, Keongco (M) Sdn Bhd as stated in the credit advice (B p 24) and the plaintiff's letter dated 14 January 2000 to Gupta Exports, India (B p 22) requesting for payment, the same Bank Bumiputra's Account No 007-USD-0001 was one of the two bank accounts of the plaintiff given to Gupta Exports for payment in plaintiff's said letter (B p 22). This coupled with the receipt dated 20 January 2000 (B p 25) issued by the plaintiff to Gupta Exports instead of to the defendant, shows in all probabilities that the said part payment could have been made by Gupta Exports to the plaintiff and not by the defendant. The plaintiff's statement of account vide bundle B p 45 dated 29 December 2005 addressed to Gupta Exports, India clearly confirmed the fact that Gupta Exports had made payment of USD55,485 on 20 January 2000 leaving a balance of USD90,920 still due and payable. With this clear evidence, it will be against the correct finding of facts to contend and find that it was the defendant who made that part payment. The plaintiff's such contention must be rejected as it is against the weight of evidence. I hold that the payment of USD55,485 was made by Gupta Exports and not by the defendant personally. On this finding, it will be untenable for the plaintiff to argue that the defendant had contracted to pay and had made part payment towards the total purchase price.

OTHERS MATTERS RAISED

[14] The defendant had raised the incident of his abduction in Shenzhen, China and that he was made to sign on three blank paper. However, no evidence was led as to whether any of the documents annexed in the bundles of documents filed herein this case, was prepared on any of these three blank paper that he was compelled to sign. Hence, I find no relevance of this allegation in relation to the four consignments in issue and to the sum still due and owing as claimed by the plaintiff.

[15] On the issue of jurisdiction or forum conveniences pursuant to s 23 of the Courts of Judicature Act 1964 raised by the defence, with the finding of this court above that there is no oral contract between the plaintiff and the defendant in relation to the sale and purchase of the four consignments above-mentioned, this question of jurisdiction does not arise. If there was such an oral contract between the parties and the contract was presumably concluded in Penang, then this court would have the local jurisdiction to hear this case as the cause of action arose in Penang although the defendant could be residing in Chennai, India. As it is now, I find this to be non issue as between the plaintiff and the defendant.

CONCLUSION

[16] There is no clear evidence from the plaintiff to prove the existence of an oral and valid contract in respect of the aforesaid four consignments of garlic and all relevant documentary evidence as referred to and deliberated above are in fact inconsistent with the existence of an oral contract between the plaintiff and the defendant. Conversely, these documentary evidence prove a direct contract of goods sold and delivered between the plaintiff and the two respective Indian traders abovenamed. The role of the defendant, in all probabilities, was that of an intermediary who introduced clients or purchasers of garlic in India to the plaintiff for a commission. The defendant is thus not privy to the contracts between the plaintiff and the two Indian traders he introduced and is not obligated to pay the plaintiff the balance of the purchase price as claimed.

[17] For the foregoing reasons, I hold, on a balance of probabilities that the plaintiff had failed to prove its case against the defendant. The plaintiff's claim is consequently dismissed with costs of RM8,000.

Plaintiff's claim dismissed with costs.

Reported by Ashok Kumar